



**QORTI CIVILI
PRIM' AWLA**

**ONOR. IMHALLEF
JOSEPH ZAMMIT MC KEON**

Seduta tat-13 ta' Gunju, 2011

Citazzjoni Numru. 222/2010

Ronald Azzopardi (ID 700661M)

kontra

Taormina Holdings Limited (C 4774)

u

Sovereign Hotels Limited (C 10538)

II-Qorti :

I. Preliminari

Rat ir-rikors prezentat fit-8 ta' Marzu 2010 li jaqra
hekk –

Illi r-rikorrent huwa azzjonista minoritarju fis-socjeta' Sovereign Hotels Limited (C 10538) b'178,750 Ordinary 'A' Shares u 96,250 Ordinary 'B' Shares, filwaqt illi s-socjeta' intimata Taormina Holdings Limited hija azzjonista maggoritarja fl-istess kumpannija, b'825,000 Ordinary 'C' Shares (Dokument 'A');

Illi b'rizoluzzjoni straordinarja tal-kumpannija Sovereign Hotels Limited tat-13 ta' Frar 2004 (inkluz fid-Dokument 'A'), kien gie miftiehem unanimament bejn l-azzjonisti kollha fl-istess kumpannija illi ghandhom ikunu biss id-detenturi tal-Ordinary 'B' Shares illi jkollhom is-setgħa illi jappuntaw id-diretturi fuq il-Bord tad-Diretturi tal-istess Sovereign Hotels Limited – biss qabel it-tehid ta' din ir-risoluzzjoni l-istess kumpannija kienet titmexxa minn Bord ta' erba' diretturi, li kienu l-istess rikorrent, Jean Pierre Borg (illi kien effettivament ittrasferixxa l-ishma kollha tiegħu fl-istess kumpannija lir-rikorrent fis-6 ta' Meju 1999), u Christopher Gauci u Josue` Gauci (illi t-tnejn huma azzjonisti u diretturi fis-socjeta' intimata Taormina Holdings Limited – Dokument 'B');

Illi d-ditta ta' awdituri, Ernst & Young, ippreparat u hejjiet il-kontijiet annwali tal-kumpannija Sovereign Hotels Limited għas-snin finanzjarji li għalqu fit-30 ta' Gunju 2001, 30 ta' Gunju 2002 u 30 ta' Gunju 2003 – liema inkarigu kien gie mogħti lilhom mill-Bord ta' Diretturi kif kompost dak iz-zmien, u cioe' qabel ma sehhet ir-risoluzzjoni straordinarja hawn fuq imsemmija ;

Illi meta l-imsemmija ditta ta' awdituri pprezentaw il-kontijiet annwali tal-kumpannija lill-esponent lejn l-ahhar tas-sena 2009, ir-rikorrent kien ha hsieb sabiex johrog avviz għal-Laqgħat Generali Annwali għas-snin in dizamina (Dokument 'C') sabiex jigu approvati dawn il-kontijiet annwali mill-azzjonisti, qabel dawn jigu ffirmati mid-diretturi tal-kumpannija Sovereign Hotels Limited ;

Illi effettivament l-ewwel appuntament ghal dawn il-Laqghat Generali Annwali kien intiz ghat-Tlieta 2 ta' Frar 2010, fis-02:30pm, fl-ufficcju registrat tal-kumpannija, izda dawn il-Laqghat Generali Annwali kellhom jigu aggornati billi kien ipprezenta ruhu biss ir-rikorrent (flimkien mas-Segretarju ta' Sovereign Hotels Limited) u ghalhekk ma kienx hemm il-quorum necessarju sabiex jitkomplew l-imsemmija Laqghat Generali Annwali

Ghalhekk, ai termini tar-Regolament 37 tal-Ewwel Parti tal-Ewwel Skeda tal-Kapitolu 386 tal-Ligijiet ta' Malta, l-imsemmija Laqghat Generali Annwali gew aggornati ghat-Tlieta, 9 ta' Frar 2010, fl-istess hin u lok (Dokument 'D');

Illi, fil-hin u l-jum stabbilit sabiex jitkomplew il-Laqghat Generali Annwali ta' Sovereign Hotels Limited, rega' deher biss ir-rikorrent (flimkien mas-Segretarju tal-kumpannija) u, billi ai termini tal-istess imsemmi Regolament 37 ir-rikorrent wahdu seta' jikkostitwixxi quorum ghaz-zamma tal-Laqghat Generali Annwali in kwistjoni, l-istess Laqghat Generali Annwali tmexxew regolarment, fl-assenza kontinwa tal-intimata Taormina Holdings Limited, u gew approvati l-audited financial statements ta' Sovereign Hotels Limited ghas-snin finanzjarji li ghalqu fit-30 ta' Gunju 2001, 30 ta' Gunju 2002 u 30 ta' Gunju 2003 (Dokument 'E');

Illi madankollu, meta r-rikorrent talab illi l-imsemmija kontijiet annwali u r-rapport tad-diretturi jigu ffirmati minn Christopher Gauci, illi dejjem kien iffirma l-kontijiet annwali u r-rapport tad-Diretturi tal-kumpannija Sovereign Hotels Limited fis-snin precedenti, huwa rrifjuta li jaghmel dan, bl-iskuza illi huwa ma ghadux jikkupa l-kariga ta' direttur fl-imsemmija kumpannija (Dokument 'F');

Illi meta r-rikorrent ipprezenta l-kontijiet annwali in dizamina, debitament iffirmati minnu biss (Dokument 'G'), id-ditta tal-awdituri Ernst & Young irrifjutaw illi jiffirmaw l-istess kontijiet annwali, ossija r-rapport tal-awdituri fl-istess kontijiet, billi qed jikkontendu illi l-istess kontijiet finanzjarji ma humiex "properly signed" mid-diretturi ta' Sovereign Hotels Limited, u b'dan qed ifissru illi l-istess kontijiet jehtiegu l-firma ta' zewg diretturi li kienu membri tal-Bord tad-Diretturi fis-snin in kwistjoni (Dokument 'H') ;

*Illi, in sostenn ta' dan, l-istess ditta ta' awdituri qeghdin jiccitaw id-dispozizzjonijiet tal-Artikolu 176(1) tal-Att dwar il-Kumpanniji illi jghid testwalment illi "l-kontijiet annwali ta' kumpannija ghandhom ikunu approvati mill-bord tad-diretturi u l-karta tal-bilanc ghandha tkun datata u ffirmata f'isem il-bord minn **zewg diretturi tal-kumpannija**" ;*

*Illi ghandu jinghad ukoll anke l-Artikolu 178(1) tal-Att dwar il-Kumpanniji jipprovdi testwalment illi "l-rapport tad-diretturi ghandu jkun approvat mill-bord tad-diretturi u datat u ffirmat f'isem il-bord minn **zewg diretturi tal-kumpannija.**"*

Illi r-rikorrent ghandu kull interess illi jassigura illi l-affarijiet tal-kumpannija Sovereign Hotels Limited jitmexxew sew u partikolarment li ma jkunx hemm xi ommisjoni li tista' tkun ta' pregudizzju ghall-istess kumpannija u ghall-ufficjali taghha. Fil-fatt, apparti l-penalitajiet kontemplati fl-artikoli succiti f'kaz ta' nuqqas ta' osservanza mad-dispozizzjonijiet legali msemmija, ir-rikorrent ircieva diversi ittri mit-Tax Compliance Unit sabiex jigu pprezentati dawn il-kontijiet finanzjarji tal-kumpannija Sovereign Hotels Limited (Dokument 'I'), izda r-rikorrent qieghed fl-impossibilita' li jaghmel dan, sakemm l-imsemmija kontijiet ma jigux iffirmati minn zewg diretturi, kif rikjest taht l-Artikolu 176(1) tal-Kapitolu 386 ;

Illi, kif gia' spjegat, id-diretturi fis-socjeta' intimata Taormina Holdings Limited kienu wkoll id-diretturi fis-socjeta' Sovereign Hotels Limited fis-snin relatati għall-kontijiet finanzjarji in dizamina u huwa evidenti illi l-istess socjeta' intimata Taormina Holdings Limited qiegħda tagħmel minn kollox, sabiex tirrendi lill-kumpannija Sovereign Hotels Limited fi stat illi l-affarijiet tagħha ma jkunux jistghu jitmexxew sew, u dan bi pregudizzju għar-rikorrent illi, anke fil-vesti tieghu tal-uniku direttur attwali tal-kumpannija Sovereign Hotels Limited, jista' jkun soggett għal diversi penaltajiet u proceduri legali minhabba n-nuqqasijiet tal-kumpannija Sovereign Hotels Limited.

Għaldaqstant, ir-rikorrent jitlob bir-rispett illi dina l-Onorabbli Qorti jogħgobha, ai termini tal-Artikolu 402 tal-Kap. 386 tal-Ligijiet ta' Malta -

1. Tiddikjara illi, bl-agir tagħha kif hawn fuq spjegat, is-socjeta' intimata Taormina Holdings Limited qegħda tagixxi kontra l-interessi tal-kumpannija Sovereign Hotels Limited u tal-membri tagħha, b'mod illi qegħda tqiegħed lill-istess kumpannija Sovereign Hotels Limited f'sitwazzjoni illi l-affarijiet tagħha ma humiex qed jitmexxew sew, b'mod li l-omissjoni tal-kumpannija illi tipprezenta kontijiet finanzjarji approvati u debitament iffirmati skond il-ligi għas-snin finanzjarji li għalqu fit-30 ta' Gunju 2001, 30 ta' Gunju 2002 u 30 ta' Gunju 2003, sejra tkun ta' pregudizzju għall-istess kumpannija u għall-membri u l-ufficjali tagħha ;

2. Tordna illi l-kontijiet finanzjarji għas-snin finanzjarji li għalqu fit-30 ta' Gunju 2001, 30 ta' Gunju 2002 u 30 ta' Gunju 2003 jigu ffirmati minn Christopher Gauci jew Giosue Gauci, flimkien mar-rikorrent, f'isem il-kumpannija Sovereign Hotels Limited, skond il-ligi.

Bl-ispejjez u b'rizerva ghal kwalsiasi dritt ta' azzjoni, inkluz dik ta' danni, li tista' ssofri l-kumpannija Sovereign Hotels Limited u/jew ir-rikorrent b'kagun ta' dan l-agir illegali tas-socjeta' intimata Taormina Holdings Limited.

Rat id-dokumenti li kienu esebiti mar-rikors promotur.

Rat ir-risposta tal-kumpannija intimata Taormina Holdings Ltd. presentata fl-14 ta' April 2010 li taqra hekk

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1. *Illi preliminarjament, it-talba kif dedotta hija rritwali, billi qed tintalab ordni fil-konfront ta' Christopher Gauci jew ta' Giosue' Gauci personalment, li mhumix intimati, fil-kwalita' taghhom ta' ex-diretturi ta' Sovereign Hotels Ltd, meta l-intimati huma Taormina Holdings Ltd u Sovereign Hotels Ltd ;*

2. *Illi kwantu qiegħed jitlob ir-rikorrent huwa llegali, u dan billi kontijiet finanzjarji ma jistghux jigu ffirmati retroattivament u post-dated, izda fid-data li jkunu qed jigu approvati mill-Bord tad-Diretturi, u mid-direttur attwali (jekk ikun wahdu) jew minn zewg diretturi attwali, li jgorru r-responsabilita' għal dak li jkunu ser jissottomettu lill-awdituri u finalment għall-approvazzjoni tal-laqgha generali tas-socjeta' ;*

3. *Illi r-rikorrent għandu d-diskrezzjoni u r-responsabilita' li jiddeciedi wahdu bhala direttur uniku jekk għandux japprova u jiffirma l-kontijiet finanzjarji ; huwa zbalja fil-procedura li segwa billi (a) hejja dokumenti ntizi sabiex jigu ffirmati retroattivament u b'data differenti minn dik kurrenti u (b) fejn huwa ssottometta għall-approvazzjoni tal-Laqgha Generali ta' Sovereign Hotels Ltd kontijiet finanzjarji mhux iffirmati, datati*

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retrospettivament, u mhux akkumpanjati mir-rapport (iffirmat) ta' l-awdituri.

4. *Illi r-rikorrent irrefera ghall-htiega tal-firma ta' zewg diretturi ai termini ta' l-artikoli 176(1) u 178(1) tal-Kap. 386 minghajr ma jikkunsidra l-artikolu 137(2) ta' l-istess Kap. 386, li jiccara li meta kumpannija tkun privata, bhal ma hi Sovereign Hotels Ltd, jista' jkollha direttur wiehed li jiffirma wahdu ;*

5. *Illi finalment jigi sottomess illi r-rikorrent kjarament m'ghandux idea ta' kif jaqdi d-dmirijiet tieghu bhala direttur, li l-ghajnuna professjonali li qieghed jinghata mill-awdituri tieghu kjarament mhijjex tghinu, u li azzjoni legali minnu proposta hija priva minn kull fundament guridiku ; u li ghaldaqstant ir-rimedju l-iktar idoneu jkun pjuttost li r-rikorrent jigi sostitwit fil-kariga tieghu b'persuna iktar serja u b'idea bazika ta' kif titmexxa kumpannija.*

Qieset il-provi u cioe` dawk li tressqu permezz ta` dokumenti u dawk li tressqu permezz ta` persuni li xehdu viva voce u cioe` r-rikorrent u Franco Azzopardi fl-udjenza tas-27 ta` April 2010 (fol 228 u 229) u Anthony Doublet fl-udjenza tal-25 ta` Mejju 2010 (fol 248).

Qieset is-sottomissjonijiet finali bil-fomm tad-difensuri tal-partijiet waqt l-udjenza tat-22 ta` Gunju 2010.

Rat id-digriet taghha moghti fl-istess udjenza fejn halliet il-kawza ghas-sentenza.

Ikkunsidrat :

II. Provi

In sintesi, il-provi kienu dawn –

Franco Azzopardi *Company Secretary* ta' Sovereign xehed li Dok C a fol 117 kien l-avviz li bih issejhet il-laqgha generali annwali ta' Sovereign ghat-2 ta' Frar 2010 fis-2.30 p.m. fl-ufficcju registrat taghha u cioe' Windsor Hotel, Windsor Terrace, Sliema, bl-agenda tkun tikkonsisti minn erba' *items* l-ewwel tlieta l-approvazzjoni tar-*reports and financial statements* tal-kumpannija rispettivament ghas-snin li ghalqu fit-30 ta' Gunju 2001, 30 ta' Gunju 2002 u 30 ta' Gunju 2003 u bl-ahhar item tkun *director's report on ongoing audits of the Company for the remaining financial years to date*. L-avviz huwa datat 18 ta' Jannar 2010 u ntbaghat lill-membri fl-indirizzi li kienu jirrizultaw fir-records tal-kumpannija. Kif jirrizulta mid-dokumenti a fol 118 et seq, ghal-laqgha kien prezenti biss ir-rikorrent. Billi sa ma saru t-3.00 p.m. ma deher hadd aktar, ma kienx hemm quorum u ghalhekk il-laqgha kienet aggornata ghad-9 ta' Frar 2010 fis-2.30 p.m. fl-istess post. Dan kollu jirrizulta fil-minuti li huma esebiti fejn jidhru l-firem tieghu u tar-rikorrent. Fid-9 ta' Frar 2010 fis-2.30 p.m., rega' kienu prezenti biss ir-rikorrent u hu. Stennew sat-3.00 p.m., baqa' ma deher hadd aktar u ghalhekk bdiet il-laqgha. L-accounts kienu approvati mir-rikorrent. Kollox jirrizulta hekk registrat mid-dokumenti a fol 122 et seq fejn jidhru l-firem tieghu u tar-rikorrent. Hadd mill-membri assenti ghal-laqgha ma kkomunika mieghu.

Ronald Azzopardi kkonferma l-kontenut tar-rikors promotur. Huwa qal li b'effett mit-13 ta' Frar 2004, huwa l-uniku direttur tal-kumpannija intimata Sovereign Hotels Limited ("Sovereign"). Sat-12 ta' Frar 2004, bhala diretturi kien hemm ukoll Giosue' Gauci u Christopher Gauci ("Gauci"), u allura nkluz fis-snin 2001, 2002 u 2003 fejn il-kontijiet relattivi huma mertu ta' din il-kawza. Gauci kien hatru lil Ernst & Young bhala l-awdituri ta' Sovereign. Il-kumpannija intimata Taormina Holdings Limited

(“Taormina”), li Gauci kienu jirraprezentaw bhala diretturi ta` Sovereign, kienet tippossjedi 75% tal-ishma ta` Sovereign kif ghadha taghmel sal-lum. Fil-fatt Taormina kellha wkoll dritt ta` *casting vote*. Sabiex isir l-*audit*, Ernst & Young kienet tircievi t-taghrif necessarju minghand Gauci ghax Gauci kienu jmexxu lil Sovereign.

Ir-rikorrent kompla jghid li hadd min-naha ta` Taormina ma kien avzah li Taormina kienet bidlet l-ufficcju registrat taghha jew li Gauci bidlu l-indirizz taghhom. Fl-istess waqt sostna li Christopher Gauci kien jaf bl-agenda tal-laqgha generali ta` Sovereign. Kien ukoll baghat lil Gauci kopja tad-*draft audited financial reports* li hallas ghalihom ix-xhud. Fl-ewwel seduta tal-laqgha generali, dehru biss hu u s-Segretarju ta` Sovereign. Min-naha ta` Taormina ma deher hadd. Billi ma kienx hemm *quorum*, il-laqgha thalliet ghal darb`ohra. F`din it-tieni laqgha, Gauci jew xi hadd jirrapresenta lil Taormina rega` ma dehru, u ghalhekk huwa mexxa wahdu fis-sens li approva l-*accounts* wahdu bhala azzjonista u ffirmahom wkoll wahdu bhala direttur waqt dik it-tieni seduta tal-laqgha generali. Meta mbaghad ha l-*accounts* ghand l-awdituri, dawn ma accettawhomx ghaliex kien hemm biss il-firma tieghu u nsistew li kellhom jigu ffirmati wkoll minn wiehed minn Gauci ghax kienu diretturi wkoll fis-snin in kwistjoni. Il-konsegwenza ta` dan kollu hija qieghed jiffaccja problemi mat-Tax Compliance Unit.

Ir-rikorrent sostna li l-abbozzi tal-accounts in kwistjoni kienu tlestew mill-awdituri fiz-zmien li ghalih kienu jirreferu pero` billi ma kienux thallsu d-drittijiet taghhom baqghu ma ghaddewhomx lid-diretturi ta` Sovereign. L-accounts baqghu bid-dati taz-zmien meta saru ghalkemm kienu approvati snin wara fil-laqgha generali in kwistjoni.

Anthony Doublet xehed li huwa partner fl-audit firm Ernst & Young u hadem fuq l-audit ta` Sovereign ghas-snin in kwistjoni. Kienu avvicinati mid-diretturi ta`

Taormina pero` l-inkariku nghata minn Sovereign. Dwar l-annual reports u l-financial statements in kwistjoni li huma esebiti wiehed a fol. 131, l-iehor a fol. 160, u l-iehor a fol. 189, huwa stqarr li l-financial statements huma responsabbilta' tad-diretturi. Bhala awdituri, huma jaghtu opinjoni ndipendenti skond it-taghrif li jircievi mill-kumpannija. Id-dokumenti kienu ndikati ghall-firma ta` Christopher Gauci u Ronald Azzopardi ghax it-tnejn kienu diretturi fis-snin tal-audits in kwistjoni.

Din il-Qorti staqsiet lix-xhud hekk -

Sur Doublet meta f'audit year partikolari id-diretturi jkunu Directors A, B jew C, intom tistennew li huma jiffirmawhom jew jista' jiffirmahom anke direttur li jkun gie in subsequent audit years ?

Ix-xhud wiegeb hekk -

Nistghu naccettaw diretturi in subsequent audit years jekk dak id-direttur huwa ppreparat jiehu responsabbilta' tal-financial statements hu. L-uniku precizazzjoni li naghmel huwa li dawn kienu lesti l-audit dak iz-zmien u kienu suppost gew iffirmati ma nafx hemm id-dati ta' dak iz-zmien, u ma gewx iffirmati. Ahna konna lestejna x-xoghol ahna, jigifieri jekk jigu ffirmati llum ghall-argument minn direttur li ma kienx direttur fid-data li ghamilna ahna, ahna obbligati taht l-ethics naghmlu subsequent events. The subsequent events review after the balance sheet date, li qed nghidu l-ahhar wahda hija 2003, after so many yearsto carrying out the audit of another four years, li it's not a realistic nahseb la ghall-kumpanija u lanqas ghalina. Jigifieri imm jekk direttur huwa, jista' jkun probabbilment dawk l-audits iridu jergghu jsiru at this point in time. Kieku kien xahar wara, xahrejn, naghmlu xoghol ta' xahar nara li ma nbidel xejn, imma erba' snin jigifieri.

Anthony Doublet fisser li d-data li tidher fir-rapporti ta` gheluq is-snin in kwistjoni hija d-data tal-abbozz mhux

id-data li fiha kellha ssir il-firma mid-diretturi. L-audits esebiti kienu dawk li kellhom jigu prezentati mid-diretturi lill-laqgħa generali. Il-fatt li d-*draft annual reports and financial statements* kellhom data ma jfissirx li kienu lesti minn kollox għax mhux eskluż li kien għad jehtiegu xi informazzjoni mingħand id-diretturi. Però seta` jgħid bi kwazi certezza li fid-dati li jidhru fil-kaz ta` kull wiehed mit-tliet audits in kwistjoni ix-xogħol kien lest u kien jonqos biss l-approvazzjoni u l-firem tad-diretturi. Billi l-accounts huma r-responsabilita` tad-diretturi, u għalhekk issir l-*letter of representation*, huma bhala awdituri jiffirmaw l-accounts wara li jkunu gew approvati mill-azzjonisti fil-laqgħa generali u jkunu ffirmati mid-diretturi.

Ix-xhud kompla hekk -

... *jekk id-diretturi jdumu hafna biex japprovaw did-data tinbidel u jekk tinbidel u z-zmien li jkun għadda twil, imbagħad ahna rridu naraw jekk inkunux għadna nistghu nagħtu opinjoni jew jekk jerga' jrid jista' jsir l-audit, għax subsequent events huwa haga li skond l-International Standards on Auditing tagħna rridu nagħti kaz tagħha.*

Anthony Doublet kompla jixhed li d-*drafts* ingabru mir-rikorrent fl-2009 wara li hallas id-drittijiet tagħhom però mhux eskluż li kienu diga` taw kopji tagħhom snin qabel lill-kumpannija.

Ix-xhud fisser li huwa ma kienx infurmat li kien sar *annual general meeting* ta` Sovereign li kien approva d-*drafts*. Huwa però ma ffirmaw l-accounts għar-raguni li tirrizulta f`Dok H a fol 218 fejn *inter alia* jingħad lejn l-ahħar tad-dokument : ... *our audits cover the periods September 2002, March 2003, October 2003 for the year-ends respectively. Therefore the directors in office at those tiomes should sign. The financial statements specify Ronald Azzopardi and Chris Gauci. The financial statements have not yet been signed by Chris Gauci.*

Anthony Doublet spjega li meta ighaddi zmien fit-tul bejn id-data meta huma ihejju l-audit sad-data tal-firma, huma obbligati skond l-International Standards on Auditing li jaghmlu review ta' *subsequent events*. Li jsir fil-prattika huwa li huma jikkellmu mad-diretturi sabiex jaraw jekk hemmx xi affarijiet li hargu wara l-year end li ghandhom impact fuq il-figuri li jkunu hadmu fuqhom huma bhala awdituri.qed nitkellmu fuqhom. Direttur huwa fl-ahjar pozizzjoni li jghid jekk dawk l-accounts humiex rapprezentattivi tal-fatti jew le. Direttur huwa responsabbli ta' l-azzjonijiet u l-affarijiet ta' kumpanija ghaz-zmien li fih ikun direttur.

L-awditur kien mistoqsi hekk mill-Qorti –

Tax-xoghol taghkom, thallastu snin wara ghal mitt elf raguni tkun xi tkun ir-raguni, pero' issa l-individwu ghandu l-accounts f'idejh ghax dil-kawza ghalhekk qiegghda. Mela l-individwu se jmur b'dawn l-accounts u hekk sar f'dal-kaz wara l-approval tal-general meeting, ghand id-diretturi precedenti u jghidilhom iffirmahom u d-diretturi l-ohrajn qed jirrifjutaw, dal-gist. Issa d-domanda tieghi hija din, l-ispecial circumstances li jista' jbiddu l-istat ta' fatt kif jistghu jinfluwenzaw, jigifieri fatti li graw wara l-audit date kif jistghu jinfluwenzaw id-data ta' l-audit jigifieri dik id-data fejn intom ghamiltu x-xoghol taghkom, u allura tipprekludi lil dak id-direttur milli jiffirmahom, jghid dawk graw wara jien ma kontx hemm dak iz-zmien, kif tista' tippregudikaha ?

Huwa wiegeb hekk –

Issa dik nista' ntik ezempju l-ahjar, jigifieri ahna qed naghtu opinjoni fuq il-balance sheet as at a point in time qisu ritratt ta' state of affairs tal-kumpanija b'dak il-mod. Issa jekk ghandna debitor ta' mitt elf ghall-argument qed nivvinta figura, li qed nuruh bhala debtor fil-financial statement, after the year end nirrealizza li dan ma kienx eh kien fallut, u kien fallut ...ta' fatti ta' dak iz-zmien ghax

jekk falla three years later they stand the accounts as they were at that time. Imma fuq informazzjoni ahna dak nikkoregu l-accounts jew kien hemm kaz il-Qorti, jew kien hemm informazzjoni jista' jkun ukoll li tohrog wara li s-sales figure ma kienitx korretta. Ahna x-xoghol taghna huwa on a sample basis u nispjegawha fl-audit, jigifieri ma noditjawx kull figura, kull transaction li taghmel il-kumpanija, impossibbli. Allura jista' jkun jigru affarijiet wara where certain things li ma konniex nafu at the time come to light, allura ahna obbligati nirriflettuhom fil-financial statements.

Ikkunsidrat :

III. Sottomissjonijiet

In sintesi, is-sottomissjonijiet tar-**rikorrent** kienu dawn -

1) Fiz-zmien meta Ernst & Young inghataw l-inkariku li jaghmlu *audit* ta' l-accounts ta' Sovereign, il-bord tad-diretturi ta' din tal-ahhar kien kompost minn zewg diretturi rapprezentattivi ta' Taormina (li kellha 75% tal-ishma) u minn Jean Pierre Borg u r-rikorrent (li kienu azzjonisti minoritarji). Ir-rikorrent baqa' azzjonista minoritarju anke wara li baqa' wahdu jiddetjeni l-bqija tal-ishma ta' Sovereign u cioe' 25%.

2) L-accounts li dwarhom sar l-*audit* mertu ta' din il-kawza thejjew minn Gauci li kellhom il-kontroll ta' Sovereign ghaliex kienu jirraprezentaw lill-azzjonista ta' maggoranza.

3) L-awdituri lestew it-*true and fair opinion* taghhom dwar l-accounts ta' Sovereign ghas-sena finanzjarja li ghalqet fit-30 ta' Gunju 2001 fit-30 ta' Settembru 2002. Tas-sena finanzjarja li ghalqet fit-30 ta' Gunju 2002, l-opinjoni ta' l-awdituri harget fit-30 ta' Marzu

2003. Tas-sena finanzjarja li ghalqet fit-30 ta' Gunju 2003, kollox kien lest sas-17 ta' Ottubru 2003.

4) Bhala fatt jirrizulta li l-awdituri ma kienux lest jaghtu rilaxx tal-accounts qabel jithallsu. Fil-fatt ghal numru ta` snin id-draft audited accounts baqghu ma ngabru minn l-ebda direttur, sakemm fl-2009 gabarhom u hallas ghalihom ir-rikorrent.

5) Il-ligi titkellem dwar *accounting periods* fejn id-diretturi huma responsabbli sabiex ihejju l-kontijiet u jaghmlu r-rapport tagghom. Daqstant iehor huma responsabbli l-awdituri fejn si tratta tar-rapport tagghom. Id-diretturi huma responsabbli li jqieghdu kollox quddiem l-*annual general meeting* tal-kumpannija sabiex jigu approvati *mix-shareholders*. Wara d-diretturi huma obbligati li jipprezentawhom lir-Registatur tal-Kumpanniji. Mela dawk li kienu diretturi fil-perijodi in kwistjoni huma responsabbli ghal dawk il-kontijiet ghalkemm il-ligi ma tghidx liema direttur ghandu jiffirma. Ghal kull *accounting period* ir-responsabbilta' hija tal-persuni li kienu diretturi ta' dak l-*accounting period*.

6) Ir-rapprezentanti ta` Taormina setghu attendew ghal-laqgħa generali anke jekk biss sabiex jaraw x`fihom l-accounts pero` ma wrewx dan l-interess ghaliex l-interess tagghom huwa biss li jaraw lil Sovereign falluta.

7) Ir-rikorrent ghandu interess jaghlaq il-*financial statements* ghal dawk it-tliet snin, jekk huwiex bil-firem ta' zewg diretturi jew b'firma wahda ta' direttur wiehed hija haga li trid tiddeciedi din il-Qorti.

8) Dwar l-ewwel eccezzjoni, ir-rikorrent ighid li fl-ambitu tal-Art.402 tal-Kap.386 il-Qorti ghandha poteri wiesgha. Azzjoni ta` din ix-xorta trid issir kontra l-kumpannija u kontra l-azzjonista ta` maggioranza li r-rapprezentanti tagħha huma d-diretturi li rrifjutaw li

jiffirmaw. Il-Qorti ghandha s-setgha li tordna illi l-persuni li kienu diretturi fiz-zmien in kwistjoni jiffirmaw l-accounts relattivi ghall-*accounting period* fejn huma kienu diretturi.

9) Dak li r-rikorrent qieghed jitlob mhuwix li l-persuni koncernati jaghmlu att skorrett jew illegali izda li jaghmlu dak li kien messhom ghamlu fiz-zminijiet in kwistjoni u li ma ghamlux. Qabel ma marru ghand l-awditur, dawk l-accounts kien messhom gew iffirmati.

10) Ir-rikorrent m`ghandux jiffirma wahdu accounts taz-zmien in kwistjoni meta ma kienx hu li hejja dawk l-accounts.

s-Sur Azzopardi ma jistax jaqbad u jhejji accounts ohra ghax diga' huma mhejjija mid-diretturi ta' qablu. U hemm forsi jkun qieghed jiffalsifika. Is-Sur Azzopardi l-accounts diga' lesti mhejjija mid-diretturi ta' qablu, pero' ma jffissirx ghax jiena ndum sitta, seba', tmienja, disa', ghaxar snin ma nqieghdom fuq l-AGM dawk l-accounts jispicaw! Dawk l-accounts hemm qeghdin, dawk l-accounts saru. Minn min saru? Mid-diretturi ta' dak iz-zmien.

In sintesi, is-sottomissjonijiet ta' **Taormina** kienu dawn -

1) Bir-ragun Gauci qeghdin jirrifjuta li jiffirmaw il-*financial statements* in kwistjoni ghaliex fir-realta` dak li qieghed ikun pretiz minnhom huwa li jiffirmaw illum u allura jaghmlu dikjarazzjoni falza b`data ta' dak iz-zmien. Li kieku tidher d-data tal-lum, huma ma jiffirmawx ghaliex m`ghadhomx diretturi u jiffirma min illum huwa direttur.

2) Id-direttur huwa mqabbad mill-azzjonisti sabiex jamministra l-kapital taghhom. L-awditur qieghed hemm biex wara li d-direttur ilesti l-accounts u jiffirmahom,

wara li jhejji u jiffirma d-directors report u jassumi r-responsabbilta' tat-tmexxija tieghu, l-awditur ghan-nom tal-azzjonisti (mhux tad-diretturi) jaqbad dak id-directors report u jaghti l-veduti tieghu. Ix-xoghol tal-awditur mhuwiex li fejn isib zball ighid lid-diretturi biex jirrangawh izda jaghmel analizi *true and fair* tal-operat tad-diretturi sabiex l-azzjonisti jkollhom l-opportunita` li jduru fuq id-diretturi sabiex jaghtu rendikont tal-operat tagghom.

3) L-approvazzjoni tal-accounts trid issir b`rizoluzzjoni tal-Bord tad-Diretturi. Mal-approvazzjoni, l-accounts jigu ffirmati. L-audit jibda hekk kif id-diretturi jiffirmaw l-accounts approvati.

4) Il-kwistjoni tar-rikorrent hija biss kwistjoni ta` flus ghaliex bhala direttur uniku ma jridx igorr l-ispiza tal-*update* tal-accounts ghal-lum sabiex id-data tkun dik tal-lum.

5) Minflok ir-rikorrent iffirma l-accounts u allura ha r-responsabilita` ghalihom, huwa pprezenta quddiem il-laqgħa generali l-accounts mhux iffirmati b`audit report mhux iffirmat. Il-procedura kollha kondotta mir-rikorrent kienet nulla u propju ghalhekk Taormina ma marritx ghal-laqgħa.

6) Fil-kaz ta` *private company* li hija *private exempt*, dak kollu li suppost isir b`minimum ta' zewg diretturi jista' jaghmlu d-direttur wahdu. Ghalhekk kien zbaljat l-awditur Doublet meta qal li kienet mehtiega l-firma ta' zewg diretturi.

7) Il-Qorti ma tistax tordna direttur li japprova u jiehu responsabbilta' ta' accounts. Dik hija diskrezzjoni tad-direttur u l-Qorti ma tistax tindahal. Il-Qorti tista` tordnalu jwarrab. Inoltre ma tistax din il-Qorti tordna lil Gauci li nhumieq parti fil-kawza sabiex jiffirmaw *accounts*.

8) Jekk ir-rikorrent ma riedx jiehu wahdu r-responsabbilta' tal-accounts in kwistjoni u ma jiffirmahomx, l-azzjoni li kellu ma kenitx dik tentata minnu illum.

Ikkunsidrat :

IV. Dritt

Ir-rikorrent qiegħed jibbaza z-zewg talbiet tieghu fuq l-**Art.402 tal-Kap.386**.

Irrizulta li r-rikorrent huwa azzjonista minoritarju ta` Sovereign u pprezenta l-istanza tieghu kontra l-istess Sovereign u kontra l-azzjonista ta` maggoranza li hija Taormina.

Meta l-kawza tigi ntavolata minn azzjonista, id-disposizzjoni tghid hekk -

(1) Any member of a company who complains that the affairs of the company have been or are being or are likely to be conducted in a manner that is, or that any act or omission of the company have been or are or are likely to be, oppressive, unfairly discriminatory against, or unfairly prejudicial, to a member or members or in a manner that is contrary to the interests of the members as a whole, may make an application to the court for an order under this article.

Jekk il-Qorti ssib li l-ilment tar-rikorrent huwa *well-founded and that it is just and equitable to do so*, imbagħad skond is-subartikolu (3) *the court may make such order under such terms as it thinks fit* -

Kopja Informali ta' Sentenza

(a) regulating the conduct of the company's affairs in the future ; or

(b) restricting or forbidding the carrying out of any proposed act ; or

(c) requiring the company to do an act which the applicant has complained it has omitted to do ; or

(d) providing for the purchase of the shares of any members of the company by other members of the company or by the company itself and, in the case of a purchase by the company, for the reduction accordingly of the company's issued share capital ; or

(e) directing the company to institute, defend, continue or discontinue court proceedings, or authorising a member or members of the company to institute, defend, continue or discontinue court proceedings in the name and on behalf of the company ; or

(f) providing for the payment of compensation by such person as may have been found by the court responsible for loss or damage suffered as a result of the act or omission complained of, to the person suffering the said loss or damage ; or

(g) dissolving the company and providing for its consequential winding up.

Jidher li l-Qrati ghandhom diskrezzjoni pjuttost wiesgha kemm sabiex jiddeciedu jekk kienx hemm agir a skapitu tal-azzjonista ta` minoranza li titkellem dwaru d-disposizzjoni u kemm fir-rimedju li tista` taghti.

L-Art.402 tal-Kap.386 isib is-sors tieghu fl-Art.459 tal-Companies Act 1985 tal-Ingilterra maghrufa bhala *the unfairly prejudicial remedy*.

L-awtur Brian Cheffins f'pagna 285 tal-ktieb **"Company Law – Theory, Structure and Operation"** (Oxford University Press 1998) ighid –

Under this provision, a Judge can grant relief on the grounds that a company's affairs have been conducted in a manner which is unfairly prejudicial to the applicant. Section 459 is an example of an open-ended rule since the legislation does not define in any way the type of conduct which qualifies as unfairly prejudicial and provides a Judge with broad powers to grant to a successful applicant whatever remedy is appropriate.

Anke b`riferenza ghall-ewwel eccezzjoni ta` Taormina fil-kawza tal-lum, din il-Qorti tghid li l-azzjoni ta` din ix-xorta tista` ssir mhux biss kontra l-azzjonista ta` maggoranza, u kontra l-kumpannija nfisha li taghha r-rikorrent huwa azzjonista ta` minoranza, izda tista` ssir anke kontra terzi li bl-agir taghhom ikun jirrizulta agir oppressiv kontra l-jeddijiet tar-rikorrent.

F`pagna 218 tal-ktieb **"Minority Shareholders: Law, Practice and Procedure"** (2000), Victor Joffe ighid hekk -

The petitioner will be the member seeking relief, and the company of which he is a member and in relation to whose affairs he alleges unfairly prejudicial conduct will be made a respondent. Additionally, every member of the company (other than the petitioner) whose interests might be effected by the relief sought should be joined as a respondent, whether or not allegations of unfairly prejudicial conduct are made against him: in the case of a small private company, this will usually mean that every member ought to be joined as a respondent to the petition. The category of potential respondents (other than the company) is not, however, limited to members of the company. In an appropriate case, relief may be sought against a non- or former member. The width of the

category of potential respondents is indicated by “Lowe vs Fahey” where it was held that if the unfairly prejudicial conduct alleged was a diversion of corporate funds, a petitioner could seek relief not only against members and former members, but also against directors involved or third parties who knowingly received or improperly assisted in the diversion. Even a person who is not actively involved in the conduct of the affairs of the company complained of may be made a respondent, at least if he would be affected by the relief sought.

Fil-kaz tal-lum, Gauci mhumiex intimati ghalkemm, fuq l-iskorta ta` din id-dottrina, ir-rikorrent seta` nkludihom mal-intimati l-ohra, haga li ma ghamilx u lanqas talab li ssir waqt l-iter tal-kawza. Fl-istess waqt pero` r-rikorrent qiegħed jitlob minn din il-Qorti rimedju li jissarraff f`ordni li tkun torbot lil Gauci ghalkemm mhumiex parti fil-kawza.

Fis-sentenza tagħha tad-9 ta` Marzu 2007 fil-kawza **“Vella et vs Vella Brothers Ltd et”**, il-Qorti tal-Appell qalet hekk –

... l-Artikolu 402 ta' l-Att dwar il-Kumpanniji jagħti diskrezzjoni pjuttost wiesa' lill-Qrati u dan għaliex dawn il-provvedimenti għandhom l-għan li jissalvagwardjaw u jipprotegu lill-azzjonisti ta' socjeta' kummercjali, partikolarment lil dawk li huma minoritarji u li għalhekk qegħdin fl-impossibilita' li jirregolaw il-mod li bih tkun qed titmexxa s-socjeta' li fiha huma jkollhom interess ...

... din id-disposizzjoni, li hija bbazata fuq l-Art. 459 tal-Companies Act (1985) Ingliza, hija ispirata minn principji ta' ekwita' aktar milli minn drittijiet strettament legalistici biex ikun jista' jigi mogħti rimedju. Dak li hu necessarju hu li l-azzjonista jipprova li minhabba l-gestjoni tas-socjeta' partikolari hu qed isofri, jew ukoll jista' jsofri, pregudizzju ta' natura oppressiva, ingusta jew diskriminatorja. Tali gestjoni tista' tirreferi sempliciment għal xi att specifiku jew xi ommissjoni tal-kumpannija. Il-pregudizzju jista' jirreferi għall-azzjonista li qed

*jippromwovi l-proceduri, ghal xi azzjonist iehor jew ghall-interest in generali ta' l-azzjonisti. Ma hemmx ghalfejn li huwa jipprova li huwa zgur ser isofri xi pregudizzju fil-futur. Tali prova tista' ssir fuq bazi ragjonevoli ta' possibilita' ("Vincent Monreal et v. Lino Delia noe") deciza mill- Prim'Awla tal-Qorti Civili fit-13 ta' Mejju, 1999). In fatti gie deciz mill-Qrati Inglizi fil-kawza fl-ismijiet **Re: Bovey Hotel Ventures Ltd** [(1983) B.C.L.C. 290] li 'the Court will not give a list of situations when this remedy may be resorted to however one principle remains clear. A shareholder may make use of this article when his shareholding in the company has been seriously diminished at least seriously jeopardized by reason of a course of conduct or the part of those who have the de facto control of the company, which has been unfair to the member concerned'.*

Fis-sentenza taghha tal-31 ta' Jannar 2003 fil-kawza "**Ellul vs Ellul pro et noe**", il-Qorti tal-Appell irrilevat –

... Il-Qorti ta' l-Appell Ingliza stabbilit fil-kaz "in Re Saul D. Harrison & Sons plc ([1995]) 1BCLC 14)" il-linji ta' gwida dwar kif kellu jkun l-operat biex ikun jista' jigi kkwalifikat bhala, "unfairly prejudicial" (fit-test tal-Ligi Maltija din il-frazi hi tradotta "b'mod mhux gust ta' pregudizzju"). Wiehed kellu, fl-ewwel lok, jara jekk dak l-operat kienx jew le skond l-istatut tal-kumpannija. Izda fl-applikazzjoni tal-imsemmija dispozizzjoni – ispirata fuq principji ta' ekwita` aktar milli minn drittijiet strettament legali – il-Qorti tiehu in konsiderazzjoni l-aspettattivi legittimi ("legitimate expectations") li r-rikorrent jista' jkollu u li sikwiet ikunu ferm aktar wiesgha mid-drittijiet strettament legali li johorgu mill-istatut tas-socjeta`. Dawn l-aspettattivi legittimi jitwiellu minn xi relazzjonijiet personali partikolari bejn l-azzjonisti.

F`pagna 464 tat-Tielet Edizzjoni ta' **Ferrar's Company Law** insibu hekk –

... The position will vary greatly from the small private companies, commonly called quasi-partnerships, to public companies of considerable size. As a quasi-partnership, the company will usually have been formed or continued on the basis of a personal relationship involving mutual confidence. There may be an agreement or understanding that all or some of the shareholders are to participate in the conduct of the business. Restrictions on the transfer of shares will be the rule rather than the exception. The individuals involved may also have made relatively substantial capital contributions to the company. Shareholders in such companies will be a small close-knit group, actively involved in many instances in the daytoday operations and financially and personally committed to the company. Here the scope for legitimate expectations beyond their strict legal rights is obviously greatest.

However, as Lord Wilberforce stressed in Ebrahimi v Westbourne Galleries Ltd, the case for giving effect to equitable considerations must be made in each instance and it is not sufficient simply to assert that the company is small or private, for in many cases the basis of the relationship will be adequately and exhaustively laid down in the articles. If it is so defined by the articles or, for example, by the articles supplemented by a shareholders' agreement, then there is little room for finding further legitimate expectations beyond those outlined in the documents.

The interests of shareholders in larger private and public companies, on the other hand, are likely to be quite different from those of shareholders in quasi-partnerships and considerably more restricted. In these larger companies there is usually no underlying personal relationship, employment is rarely an issue and the shareholders are more interested in such matters as dividend yield and capital appreciation than involvement in the day-to-day running of the company. If they become dissatisfied, especially if it is a public

company, they can sell their shares and withdraw from the company. Here the members rarely have expectations beyond their strict legal rights as provided by the articles.

That is not to say that s. 459 does not apply to larger private companies and public companies for the section is clearly not limited to quasi- partnerships. The point is that it may be harder to establish conduct which is unfairly prejudicial to the interests of the members in such companies.

Fis-sentenza diga` citata tal-Qorti tal-Appell ta` **Vella et vs Vella Brothers Ltd.** kien rilevati ukoll li –

*Fid-decizjoni **O'Neill v Phillips** moghtija mill-House of Lords fl-20 ta' Mejju 1999, gie ritenut illi l-legislatur ried illi biex jinghata rimedju taht l-artikolu jigi kkunsidrat il-kriterju ta' dak li huwa 'fair'. Izda Lord Hoffman izid ighid li:- "Although fairness is a notion which can be applied to all kinds of activities, its content will depend upon the context in which it is being used"*

*lkompli jispjega illi – "One useful cross-check in a case like this is to ask whether the exercise of the power in question would be contrary to what the parties, by words of conduct, have actually agreed. Would it conflict with the promises which they appear to have exchanged. In **Blisset vs David** the limits were found in the 'general meaning' of the partnership themselves. In a quasi-partnership company, they will usually be found in the understandings between the members at the time they entered into association. But there may be later promises, by words or conduct, which it would be unfair to allow a member to ignore. Nor is it necessary that such promises should be independently enforceable as a matter of contract. A promise may be binding as matter of justice and equity although for one reason or another (for example because in favour of a third party) it would not be enforceable at law".*

Daqstant in linea generali dwar l-Art.402 tal-Kap.386.

Issa fil-kaz tal-lum ir-rikorrent qiegħed jinvoka l-harsien ta` din id-disposizzjoni għar-raguni li huwa qiegħed igarrab pregudizzju għaliex Gauci, li kienu diretturi ta` Sovereign fiz-zmien in kwistjoni, irrifjutaw li jiffirmaw il-*financial statements* tagħha bid-data, mhux tal-lum meta m`ghadhomx diretturi, izda taz-zmien meta tlesta l-iskrutinju tal-awdituri u meta kienu għadhom diretturi.

In sostenn ir-rikorrent iġhid li l-laqgħa generali fejn kienu approvati l-*financial statements* ta` Sovereign saret skond il-ligi u cioe` **l-Art.37 tal-Ewwel Skeda tal-Kap.386** li jaqra hekk –

If within half an hour from the time appointed for the meeting a quorum is not present, the meeting, if convened by the requisition of members, shall be dissolved ; in any other case it shall stand adjourned to the same day in the next week, at the same time and place or to such other day and at such other time and place as the directors may determine, and if at the adjourned meeting a quorum is not present within half an hour from the time appointed for the meeting, the member or members present shall be a quorum.

Skond ir-rikorrent, kienu l-awdituri li nsistew li l-firma tal-*financial statements* kellha ssir minn zewg diretturi u mhux minnu wahdu. U ccitaw l-**Art.176 tal-Kap.386** li jaqra hekk -

(1) A company's annual accounts shall be approved by the board of directors and the balance sheet shall be dated and signed on behalf of the board by two directors of the company.

(2) *Every copy of the balance sheet which is laid before the company in general meeting, or which is otherwise circulated, published or issued, shall state the name of the directors who signed the balance sheet on behalf of the board.*

(3) *The copy of the company's balance sheet which is delivered to the Registrar shall be signed on behalf of the board by the same directors who signed the balance sheet pursuant to subarticle (1).*

(4) *If annual accounts are approved which do not comply with the provisions of this Act, every director of the company who is party to their approval and who knows that they do not comply or is negligent as to whether they comply shall be liable to a penalty. For this purpose every director of the company at the time the accounts are approved shall be taken to be a party to their approval unless he proves that he took all reasonable steps to prevent their being approved.*

(5) *If a copy of the annual accounts -*

(a) is laid before the company, or otherwise circulated, published or issued, without having been signed as required by this article or without the required statement of the signatory's name being included ; or

(b) is delivered to the Registrar without being signed as required by this article, every officer of the company who is in default shall be liable to a penalty.

L-istess procedura tghodd *mutatis mutandis* ghar-rapport tad-diretturi (ara l-Art.177 u 178 tal-Kap.386).

Kontra ghal dak li sostna r-rikorrent, Taormina wiegbet billi qalet li Gauci kienu prekluzi li jaghmlu dak li r-rikorrent kien qieghed jippretendi minnhom fl-ewwel lok ghaliex ma kienux diretturi ta` Sovereign meta r-rikorrent ippretenda li kellhom jiffirmaw il-*financial statements* u fit-

tieni lok ghaliex ma kienx legali li huma jiffirmaw *accounts back-dated*. Fl-istess waqt Taormina ticcita l-**Art.137 tal-Kap.386** bhala d-disposizzjoni li kellha tidderigi lir-rikorrent bhala direttur uniku ta` Sovereign. Dan l-artikolu jaqra hekk -

(1) *Every public company shall have at least two directors.*

(2) *Every private company shall have at least one director, and where a private company has one director, all references in this Act to two or more directors shall be construed as references to such one director.*

(3) *The business of a company shall be managed by the directors who may exercise all such powers of the company, including those specified in article 136, as are not by this Act or by the memorandum or articles of the company, required to be exercised by the company in general meeting ...*

Ilkunsidrat :

V. Risultanzi

Mhux kontestat li Sovereign hija *a private* mhux *a public company*. Propju ghax hija *a private company*, b`effett mit-13 ta` Frar 2004 `il quddiem, Sovereign tmexxiet mir-rikorrent wahdu bhala l-uniku komponent tal-bord tad-diretturi. Mela anke skond l-Art.137(2), dak li l-Kap.386 jesigi li ghandu jsir minn zewg diretturi jista` jsir minn direttur wiehed fil-kaz ta` *private company* bhal ma hi Sovereign.

L-argument tal-awdituri huwa li ladarba fiz-zmien meta tlestew l-*audits* il-kumpannija kellha zewg diretturi allura kellhom ikunu huma li jiffirmaw l-accounts mhux ir-rikorrent wahdu.

Din il-Qorti m`ghandhiex prova li *l-accounts* kienu approvati mill-Bord tad-Diretturi ta` kull *accounting period* in kwistjoni u ffirmati qabel ma marru ghand l-awdituri.

Li rrizulta biss huwa, skond ma xehed ir-rikorrent, li ma kienx mhux kontradett, li *l-accounts* kienu gew preparati minn Gauci.

Izda anke jekk *l-accounts* thejjew minn Gauci qabel marru ghand l-awdituri, ir-rikorrent kien messu insista *a tempo vergine* li jigu approvati mill-Bord tad-Diretturi, li tieghu kien jaghmel parti, u jigu ffirmati qabel imorru ghand l-awdituri. U din il-Qorti se zzid. U l-awdituri ma messhom qatt hadu l-konsenja tal-accounts qabel accertaw ruhhom li kienu approvati u ffirmati mill-Bord tad-Diretturi.

Prof. Andrew Muscat fil-pagna 507-509 ta` ***Principles of Maltese Company Law*** ighid hekk –

As a general rule, the directors are obliged to ensure that the accounts are drawn up clearly and in accordance with the provisions of the Act and with generally accepted accounting principles and practice. An overriding principle, however, is that the accounts must give a true and fair view of the company's assets, liabilities, financial position and profit or loss ...

The company's annual accounts should be approved by the board of directors and the balance sheet should be dated and signed on behalf of the board by two directors of the company. Every copy of the balance sheet which is laid before the company in general meeting or which is otherwise circulated, published or issued is to state the name of the directors who signed the balance sheet on behalf of the board. The same directors are to

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sign, on behalf of the board, the copy of the balance sheet which delivered to the Registrar.

Directors need to exercise considerable caution in relation to the approval of the annual accounts. Indeed, if accounts are approved which do not comply with the provisions of the Companies Act every director of the company who was party to their approval and who knew that they did not so comply or was negligent as to whether or not they so complied is liable to a penalty. For the purposes of this rule, every director at the time the accounts were approved is considered to be a party to their approval unless he proves that he took all reasonable steps to prevent their being approved ...

Fil-kaz tal-lum irrizulta li l-accounts ghaz-zmien in kwistjoni baqghu ghand l-awdituri bhala *draft* ghaliex baqghu ma thallsux id-drittijiet tagghom. U ghaddew is-snin wara t-13 ta` Frar 2004, u cioe` id-data meta r-rikorrent sar l-uniku direttur, li l-istess rikorrent, ghax hekk kien kostrett kif jaccetta huwa stess b`riferenza ghall-pressjoni mit-Tax Compliance Unit, iddecieda li jhallas lill-awdituri hu sabiex ikollu *audit* komplet ghaz-zmien in kwistjoni.

Anke in vista tal-premess, din il-Qorti tghid li r-rikorrent m`ghandu l-ebda jedd jinsisti li persuni li **illum** m`ghadhomx diretturi ta` Sovereign jiffirmaw **illum** *accounts* b`data li tmur lura ghaz-zmien meta kienu diretturi.

Din mhijiex kwistjoni ta` procedura ta` *sanctioning* izda materja ta` trasparenza u korrettezza ta` kontabilita`.

Lanqas ma hija kwistjoni ta` legalizmu strett anzi hija materja ta` regolarita` ta` proceduri li bihom ghandhom jigu kondotti l-kumpanniji. **Ir-rikorrent ma kienx semplici azzjonista izda direttur wkoll fiz-zmien tal-accounts in**

kwistjoni. Kien obbligu tieghu li jinsisti, anke permezz ta` fakoltajiet li taghtih il-ligi, ma` min kien mieghu fil-bord dak iz-zmien sabiex jassikura li l-accounts jigu approvati kif trid il-ligi. Mhux iqieghed kollox fil-genb sa ma tinqala` l-problema, snin wara, kif fil-fatt gara.

Anke minn analizi tad-diversi disposizzjonijiet tal-Kap.386 inkluzi dawk diga` citati, wiehed isib li hemm artikoli fejn il-ligi stess introduciet flessibilita` u tat lill-Qrati diskrezzjoni wiesgha sabiex tiddeciedi, bhal fil-kaz tal-Art.402 fejn l-ekwita` aktar milli r-rigidita` tal-ligi trid li jkun assikurat id-dritt tal-azzjonista speċjalment dak ta` minoranza, fl-istess waqt hemm oħrajn relatati mad-dmirijiet tad-diretturi, iz-zamma u l-approvazzjoni tal-kontijiet, ir-rwol tal-awdituri, il-funzjoni tal-laqgħa generali u oħrajn fejn id-disposizzjonijiet huma dettaljati u rigidi u fejn inadempjenza twassal għal pieni vis-a- vi sir-Registatur tal-Kumpanniji.

Ir-rwol ta` din il-Qorti mhuwiex li toffri soluzzjoni kif donnu qieghed jippretendi r-rikorrent, anke jekk din ma tkunx konformi ma` dak li talab, izda li tghid jekk bil-provi akkwiziti jirrizultawx fondati t-talbiet tar-rikorrent għall-finijiet u effetti kollha tal-ligi u cioe` l-Art.402 tal-Kap.386, fuq liema disposizzjoni qieghed jistrieħ sabiex isostni t-talbiet tieghu.

Kollox meqjus din il-Qorti tghid li dan tal-lum mhux kaz fejn hi għandha tintervjeni għaliex ma rrizultax li l-kumpannija jew l-azzjonista ta` maggoranza (li fiz-zmien in kwistjoni kienet debitament rappreżentata fil-bord tad-diretturi) ikkommettiet abbuż, kif intiz għall-fini tal-Art.402, kif lamentat mir-rikorrent a skapitu tal-istess rikorrent, li kien minn dejjem azzjonista ta` minoranza izda wkoll direttur. Lanqas fuq bazi ragonevoli ta` probabilita`, ma huwa dan kaz fejn tirrizulta prova ta` agir oppressiv, ngustament diskriminatorju u/jew ngustament pregudizzjevoli fil-konfront tar-rikorrent u fejn allura għandha tkun din il-Qorti li tagħti rimedju.

Fl-ahhar nett, din il-Qorti tghid li ma hemmx dubbju li fil-kumpannija Sovereign hemm disgwid serju bejn l-azzjonista ta` maggoranza u l-azzjonista ta` minoranza li incidentalment huwa wkoll l-uniku direttur. Jidher li r-rikorrent u Gauci li jirraprezentaw lil Taormina la jridu u lanqas jistghu jahdmu flimkien ghaliex kull element ta' affidabbilita` u konfidenza f'xulxin spicca. Konstatata din l-*amara realta`* ma jfissirx li r-rikorrent ghamel il-prova tal-istanza tieghu. Din il-Qorti tghid biss li forsi wasal iz-zmien li l-azzjonisti *devono tirare i remi in barca* ghaliex il-*perdurata* tad-disgwid bejn l-azzjonisti certament ma jawgura xejn tajjeb ghall-futur tal-kumpannija Sovereign u tal-operat taghha.

VI. Decide

Ghar-ragunijiet kollha premessi, din il-Qorti qeghda tichad it-talbiet tar-rikorrent.

Minhabba d-diffikulta` u n-novita` tal-kaz, din il-Qorti jidhrilha li tkun haga sewwa li jkun hemm temperament fil-kap tal-ispejjez. Ghalhekk qeghda tordna li l-ispejjez ghandhom jibqghu bla taxxa bejn il-partijiet.

< Sentenza Finali >

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